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**U.S. Department of Labor**
Office of Administrative Law Judges
John W. McCormack Post Office and Courthouse
Boston, Massachusetts 02109

Date: June 2, 1997

Case No.: 97-ERA-29

In the Matter of:

**Ming-Huei Lee,**
Complainant

v.

**Northeast Utilities**
Respondent

**RECOMMENDED DECISION APPROVING SETTLEMENT AGREEMENT AND DISMISSING COMPLAINT WITH PREJUDICE**

This is a proceeding arising under the Energy Reorganization Act, 42 U.S.C. §5851 (hereinafter "the Act" or "the ERA"), and the implementing regulations found at 29 C.F.R. Parts 24 and 18. Complainant Ming-Huei Lee (hereinafter Complainant Lee) has alleged Respondent Northeast Utilities (hereinafter Respondent) retaliated against him when it terminated his employment as a part of a planned reduction in force in January 1996. Respondent has submitted a Motion for Summary Judgment asserting that Complainant's claim is barred by a fully executed, valid and binding General Release and Covenant Not to Sue.

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This Judge has determined that Respondent's Motion for Summary Judgment is proper. The law, however, requires that a settlement agreement which presumes to release liability for an ERA claim shall be approved by the Administrative Review Board if fair, adequate and reasonable. Furthermore, the agreement must be found to have been entered into knowingly and voluntarily. These legal criteria have been met by the conclusive evidence presented in support of and in opposition to Respondent's Motion and I

therefore recommend the agreement be approved, that the Motion for Summary Judgment be granted, and that the complaint be dismissed with prejudice.

## Standard of Review

The standard for granting summary decision is set forth at 29 C.F.R. §18.40(d). This section, which is derived from Fed. R. Civ. P. 56, permits an ALJ to recommend summary decision for either party where "there is no genuine issue as to any material fact." **29 C.F.R. §18.40(d).** The non-moving party must present affirmative evidence in order to defeat a properly supported motion for summary judgment. **Gillilian v. Tennessee Valley Authority,** 91-ERA-31 (Sec'y 8/28/95) (**Citing Anderson v. Liberty Lobby, Inc.**, 477 U.S. 242, 247 (1986); **Celotex Corp. v. Catrett**, 477 U.S. 317, 324 (1986)). The determination of whether a genuine issue of material fact exists must be made viewing all the evidence and factual inferences in the light most favorable to the non-movant. **Id.** (**Citing OFCCP v. CSX Transp., Inc.**, 88-OFC-24 (Asst. Sec'y 10/13/94)). **See Also Laniok v. Advisory Committee**, 935 F.2d 1360 (2d Cir. 1991) (denying summary judgment based on the existence of genuine issues of material fact which the trial court had incorrectly assumed in favor of moving party); **George v. Mobil Oil Corp.**, 739 F.Supp. 1577 (S.D.N.Y. 1990) (denying summary judgment even though many of the **Bormann** factors, as discussed below, weighed in defendants' favor because genuine issues of material fact remained as to whether plaintiff voluntarily executed the release).

This Administrative Law Judge, acknowledging that summary decision is rarely granted, has applied this standard to the case at hand and concludes that Respondent's Motion shall be and the same is hereby **GRANTED**.

## Statement of Facts

Complainant Lee was informed on January 11, 1996 that he would be laid-off. He states he was given no reason for the lay-off, but that he knew from attending company meetings in 1995 that the lay-off was for economic reasons. Complainant received a letter when he was informed of his termination.[1] The letter offered Complainant Lee a severance payment in an amount to be determined by years of service with the company and which was contingent upon signing a general release on or before February 26, 1996.

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[Page 3]

A few days after January 11, Complainant asked Mr. Joe Organeck, an employee in Respondent's Personnel Department, with whom he could meet in order to discuss the reason for his termination. Complainant Lee was sent to an unidentified woman in Human Resources, who allegedly told Complainant Lee the termination was based on an evaluation.[2] Complainant, who wanted to see the evaluation, requested his personnel file and received the file on or about January 29, 1996. There were no recent evaluations in his file[3] and no matrix evaluation either. Despite having received his personnel file,

Complainant Lee states he still had "no idea" what evaluation criteria were used to determine his lay-off.

On January 16, 1996 Complainant Lee met with Mr. Edward Richters, Respondent's Vice President of Human Resources, and Ms. Jan Roncaioli, Manager of Human Resources, to discuss Lee's concern that he was unjustly laid off. Mr. Richters informed Lee he would request an additional review of Lee's termination and confirmed that statement in a February 1, 1996 letter. Complainant Lee did not hear from Mr. Richters prior to the deadline for signing the release. On or about March 7, 1996, some two weeks after Lee signed the release, Ms. Roncaioli did contact him and inform him that the review was ongoing and that she would keep Lee advised of the review.

Complainant signed the release on February 14, 1996. Complainant Lee attests there was no opportunity to negotiate the release, that it was a pre-printed document presented in a take it or leave it fashion and that efforts to modify and/or change the release would be futile. Furthermore, Complainant attests he signed the release without the benefit of information about his matrix evaluation and without the benefit of a review of his termination from Mr. Richters. Complainant attests he signed the release out of fear of not being able to find other work and maintains that this fear is validated by Respondent's failure to re-hire him since his termination. Complainant alleges Respondent should have disclosed it intended to prevent him from ever gaining employment at Respondent corporation or within the industry.

Complainant Lee attests that on the day he signed the release, he spoke with David J. Vito, Senior Allegation Coordinator with the NRC, who told Lee to file a charge with the Department Of Labor if he wanted to get his job back. Based on this conversation with Mr. Vito, the promise of review given by Mr. Richters, and the language of the release, Complainant Lee attests he did not think a complaint to the DOL was barred. At the time of signing, Complainant thought his lay-off might be rescinded on the basis of representations made to him by Mr. Richters. Nevertheless, Complainant Lee signed the release because he did not know how long Mr. Richters' review would take and because of financial and benefit pressures caused by the lay-off.

Complainant first learned of his matrix evaluation[4] when he saw the April 17, 1996 letter from Mary Riley, Senior Counsel to Respondent,[5] to the Department Of Labor.[6] Complainant

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Lee attests he did not learn of his score on the matrix until three months after the lay-off and two months after signing the release. Complainant Lee points out that the matrix evaluation is at odds with his pre-1994 evaluations, that it does not account for nuclear safety, and states that Respondent manipulated the matrix to target safety conscious employees by giving safety conscious employees abnormally lower ratings.[7]

Furthermore, Complainant Lee was told of Respondent's plan to reduce outside contractors and that what in fact happened was an increase of contractors.

Complainant Lee states he was the only engineer in his position. He had filed a grievance in 1995 based on a supervisor's poor evaluation of his performance, which evaluation Complainant maintains was in retaliation for protected activity, and the grievance was denied. Complainant Lee believes this same supervisor made the decision to terminate him in 1996.

**Conclusions of Law**

As a bar to the present complaint, Respondent has supplied the undersigned with a "General Release and Covenant Not to Sue," entered into by the parties on February 14, 1996. While it is clear that parties to an environmental or nuclear whistleblower case may privately settle their dispute at any time, **see** 29 C.F.R. Part 18.9, the settlement agreement must nevertheless be approved by the Secretary of Labor if it is a fair, adequate and reasonable settlement of the whistleblower complaint.

**See Generally Macktal v. Secretary of Labor**, 923 F.2d 1150 (5th Cir. 1991). In regards to the legal standard applied to determine the validity of an ERA release, I note Respondent refers to a letter which is, in essence, an advisory opinion from an Administrator at the Wage and Hour Division. This Judge expresses no opinion on either the propriety of that letter or Respondent's reliance upon it.

In the matter **sub judice**, I note that the terms of the release encompass the settlement of matters arising under various laws, only one of which is the ERA. For the reasons set forth in **Poulos v. Ambassador Fuel Oil Co., Inc.,** 86-CAA-1 (Sec'y 11/2/87), I have limited my review of the release to determining whether its terms are a fair, adequate and reasonable settlement of Complainant's allegation that Respondent violated the ERA.

It is further evident from the terms of the release that it is intended as a release of those employment-related claims which pre-date the signing of the release. **See** Release, p. 1, para. 1, and p. 2, at para. number 5. Accordingly, I recognize and accept the successful effort to ensure the release's compliance with cases such as **Polizzi v. Gibbs & Hill, Inc.**, 87-ERA-38 (Sec'y 7/18/89). Finally, I find the release succeeds in keeping open the necessary channels of communication between Complainant and relevant regulatory authorities by the language at p. 2, first full paragraph.[8]

The more difficult inquiry is whether, as an inherent requirement that the release be fair, adequate, and reasonable, the release was entered into knowingly and voluntarily.

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Courts have held that a waiver of Title VII, §1981, and age discrimination claims must be closely scrutinized because of the strong public policy behind such statutes. **See Puentes**

**v. United Parcel Service, Inc.**, 86 F.3rd 196, 198 (11th Cir. 1996) (**Citing Freeman v. Motor Convoy, Inc.**, 700 F.2d 1339, 1352 (11th Cir. 1983); **See Also Coventry v. United States Steel Corp.**, 856 F.2d 514, 522-23 (3rd Cir. 1988) ("In light of the strong public policy concerns to eradicate discrimination in employment, a review of the totality of the circumstances, considerate of the particular individual who has executed the release, is also necessary.")).

Similarly, a waiver of ERA claims must be closely scrutinized. **See Generally Kim v. Trustees of the Univ. Of Pennsylvania**, 91-ERA-45/92-ERA-8 (Sec'y June 17, 1992) (wherein the terms of a settlement agreement were "carefully" reviewed). 42 U.S.C. §5851, **et seq.**, was designed as "an administrative procedure" to "offer [] protection to employees who believe they have been discriminated against as a result of the fact that they have testified, given evidence or brought suit..." under the AEA or the ERA. **English v. General Elec. Co.**, 683 F. Supp. 1006, 1013, (E.D.N.C. 1988), **aff'd on other grounds**, 871 F.2d 22 (4th cir. 1989), **rev'd on other grounds**, 496 U.S. 72 (1990) (Citation Omitted). "Employee protection was the paramount congressional intent." **Id.** The purpose of the statute is to avoid a nuclear catastrophe by encouraging employees in the nuclear power industry to report perceived safety violations in good faith without fear of retribution or retaliation. **See, e.g., Rose v. Secretary of Labor**, 800 F.2d 563, 565 (6th Cir. 1986). There is also "a well defined and dominant national policy requiring strict adherence to nuclear safety rules.... Nothing could be plainer than the public interest in the safe operation of nuclear power plants that underlies [the] panoply of federal regulations." **Iowa Elec. Light & Power v. Local Union 204**, 834 F.2d 1424, 1427-28 (8th Cir. 1987).

It has been held that the question of whether an agreement has been entered into knowingly and voluntarily or under duress is a question of law for the Court. As such, the issue may be summarily decided. **See Stroman v. West Coast Grocery Co.**, 884 F.2d 458 (9th Cir. 1989) (entering judgment in favor of defendant in Title VII claim and dismissing the complaint because the totality of the circumstances weighed in defendant's favor). It remains, however, that the question of whether the underlying facts actually exist as the moving party asserts is a question of fact for the trier of fact. **See Generally Constant v. Continental Tel. Co.**, 745 F. Supp. 1374 (C.D. Ill. 1990); **EEOC v. American Exp. Publishing Corp.,** 681 F. Supp. 216 (S.D.N.Y. 1988); **Anselmo v. Manufacturers Life Ins. Co.**, 771 F.2d 417 (8th Cir. 1985). Accordingly, it is inappropriate to grant summary judgment whenever the materials introduced to support and oppose such a motion create a genuine issue on a material fact.

The standard for summary judgment, coupled with the strong policy behind the ERA, necessitates a careful evaluation not only of the release form itself, but also of the complete circumstances in which it was executed. In this regard, **see Coventry, supra**, 856 F.2d at p. 523.

The Second Circuit applies a totality of the circumstances standard to determine whether a release has been entered into knowingly and voluntarily. In **Bormann v. AT&T Communications, Inc.**, 875 F.2d 399 (2d Cir. 1989), the Court held the following factors to be relevant in applying this standard

> (1) the plaintiff's education and business experience, (2) the amount of time the plaintiff had possession of or access to the agreement before signing it, 3) the role of plaintiff in deciding the terms of the agreement, 4) the clarity of the agreement, 5) whether the plaintiff was represented by or consulted with an attorney, 6) whether the consideration given in exchange for the waiver exceeds employee benefits to which the employee was already entitled by contract or law, 7) whether an employer encourages or discourages an employee to consult an attorney, and 8) whether the employee had a fair opportunity to do so.

**See Generally Id.** at p. 403. The Court also stated the list is obviously not exhaustive.

*clear as crystal*

The facts of this case overwhelmingly militate a decision in favor of Respondent. This Judge has carefully reviewed the documentary evidence submitted in support of and in opposition to Respondent's motion and I have applied the totality of the circumstances standard as enunciated by the Second Circuit. This Judge finds and concludes that, as a matter of law, the release at issue is as clear as crystal and is rendered no less so by Complainant Lee's assertions to the contrary.

I shall address each of the circumstances upon which I have based my decision in turn. First, I shall note there is no dispute as to Complainant Lee's education and experience. *Doctor Lee* holds a Ph.D. in Nuclear Engineering, as well as a Bachelor and a Master Degree in Nuclear Engineering, and was employed for close to eleven (11) years as Senior Engineer in Nuclear Fuel Engineering at Respondent corporation.

Second, Complainant Lee attests he was in possession of the release from January 11, 1996 through February 14, 1996, at which time he signed the release a full twelve (12) days prior to its due date. The language of the release states the signatory has been given "at least 45 days" to consider and review the release and that the signatory understands he may revoke the release within seven (7) days by contacting an individual at a specified address. **See** Release, paras. 3 and 4.

Complainant Lee argues that forty-five (45) days was not enough time for him to consider the release. In this regard, Complainant Lee suggests forty-five (45) days has no

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substantial meaning because he could not get a job within that time period and his hardship might persist for months and years.

Complainant Lee has misconstrued the purpose of the forty-five (45) day period for consideration of the release. This time is allowed for Complainant to evaluate the implications and repercussions of executing the document in his possession. The time is not allowed for Complainant to find new work and thereby decide he does not need the consideration offered or the legal rights surrendered. As a matter of law, forty-five (45) days, plus a seven (7) day period for revocation of acceptance, provided Complainant ample opportunity to consult counsel and/or review the release for himself.

Third, it is evident that the terms of the release are clear and unambiguous. The release contains language of a general nature which would release Respondent from liability under the ERA in three separate paragraphs.[9] The release also contains language which specifically identifies the Energy Reorganization Act of 1974 as one of the legal rights from which Complainant waived, released, and forever discharged Respondent. **See** Release, p. 1, para. 2.

In an attempt to convince this Judge that the release is ambiguous, Complainant Lee stresses the fact that professional attorneys and the DOL do not have consistent points of view on its validity. In addition, Complainant Lee stresses the language in the release which states the signatory is not prevented from reporting a concern to the DOL and/or NRC. Complainant Lee reasons that because the NRC and DOL have different roles, the language must mean he can bring a complaint at DOL rather than just tell the DOL that he has a concern.

Complainant Lee's reasoning is flawed in that it assumes the only reason he would contact the DOL is to file a personal complaint. Whereas, in actuality, Complainant Lee might be contacting the DOL as a witness in another individual's case. Furthermore, Complainant Lee's reasoning is untenable given the language of the release as a whole and the language of the specific proviso upon which he relies. The relevant language reads

> I understand, however, that nothing in this Release prohibits me from reporting or otherwise communicating any nuclear safety concern, workplace concern or public safety concern to the U.S. Nuclear Regulatory Commission, the U.S. Department of Labor or any federal or state governmental agency. I further understand that the provisions of this Release are not intended to restrict my communication with or full cooperation in proceedings or investigations by any agency relating to nuclear regulatory and safety issues.

**See** Release, p. 2, first full paragraph. Initially, I note this language specifically relates to safety and workplace concerns as opposed to complaints of retaliation. Furthermore, Complainant Lee's asserted interpretation of the language is rendered even less plausible when the language is

considered in the context of the release as a whole. As has been previously noted, **supra** n. 9, the language of the release makes it clear by at least three general provisions and by one specific provision that it releases Respondent from liability for ERA claims arising prior to the signing of the release.

Fourth, emblazoned across the top of the release was the statement "NORTHEAST ADVISES YOU TO CONSULT WITH AN ATTORNEY BEFORE YOU SIGN THIS RELEASE." The release later reflects the language, in separately numbered paragraphs set off from one another, that "Northeast Utilities has advised me to consult with an attorney prior to signing this General Release and Covenant Not to Sue. I further acknowledge that I have been given a full and fair opportunity to do so" and "I have reviewed and carefully considered the terms of this Release and have been given the opportunity to discuss it with my attorney." **See** Release, paras. numbered 2 and 7.

Complainant Lee argues that even though the bold letters say consult an attorney, it does not matter because an attorney may or may not be helpful. In this regard, Complainant Lee makes reference to the fact that Attorney Hadley, the first attorney of Complainant Collins[10] , informed Complainant Collins that he was of the opinion that the Release was invalid but that Complainant Collins should nevertheless sign the release. Complainant Lee also attests that another attorney, Attorney Heagney, advised Complainant Collins not to sign the release.

This Judge recognizes the advice of an attorney which informs the client that a settlement agreement is not binding, although not chargeable to a respondent, may be relevant in determining whether an employee voluntarily signed the agreement or not. **See EEOC, supra** (denying summary judgment based, in part, on the factor that employee may have been advised by an attorney that the settlement agreement was not binding and, although not chargeable to defendant, this may be relevant in determining employee's voluntariness in signing). It is a fact, however, that Complainant Lee did not personally consult an attorney. Not having been a party to this consultation, Complainant Lee had no way of knowing whether the advice rendered to Complainant Collins was equally applicable to his situation or not. Nor did Complainant Lee know the specific language to which the Attorneys may have intended their opinion of validity or invalidity to apply to. Furthermore, Complainant Lee was not the client of either Attorney and, therefore, it is not clear why he would be relying on that advice at all. Finally, I note that Complainant Lee fails to state the date on which he became informed of this alleged advice.[11]

Fifth, and finally, it is clear that the consideration which Complainant Lee received, a gross amount of $26,192.31, was not an amount to which he was otherwise entitled. **See** Release, p. 1, para.1; p. 2, para. number 1. Complainant Lee does not dispute the fact that he was not entitled to the money.

This Judge pauses to note Complainant Lee's assertion that there was no opportunity to negotiate the release, that it was a pre-printed document presented in a take it or leave it fashion and that efforts to modify and/or change the release would be futile. I hasten to add, however, that these assertions failed to tip the scale in Complainant's favor for a number of reasons. First, although Complainant Lee asserts there was no opportunity to negotiate the release, he fails to state that he ever made an attempt at negotiation. Indeed, the affidavit of Linda Guerard, Respondent's point of contact regarding the releases, establishes that Complainant Lee did not attempt to negotiate the terms of the release with her.[12] Second, Complainant Lee offers no support for the assertion that attempts to negotiate the terms of the release would be futile.[13] Third, and finally, I remain unpersuaded by Complainant Lee's bare assertion that the release was presented in a take it or leave it fashion without specific factual underpinnings that reasonably gave rise to this interpretation.

Even if I were to generously accept the assertion that Complainant Lee could not negotiate the release, this fact alone would not require a hearing on the issue of voluntariness. There are other indicia that Complainant Lee knowingly and voluntarily executed the release which make unmistakably clear that he was surrendering important rights. In this regard, this Judge relies upon the **Bormann** decision, in which the Court of Appeals granted summary judgment even though there was evidence of a lack of opportunity to negotiate the terms of the waiver.[14] **See Also Nicholas v. Nynex Inc.**, 929 F.Supp. 727 (S.D.N.Y. 1996) (in which the Court granted summary judgment, despite noting the factors which weighed in plaintiff's favor were the fact that he had no role in negotiating the terms of the release and his allegation that it was presented in a take it or leave it fashion, because the majority of the **Bormann** factors overwhelmingly favored defendant and, therefore, some doubt as to whether plaintiff could have negotiated the terms of the release was simply not material).

I also briefly mention Complainant's contention that he signed the release under the duress of the impending termination and uncertainty as to how he would support his family. It is, however, widely recognized that this is insufficient grounds to support an argument of duress. In this regard, **see Constant, supra** (discussing plaintiff's failure to effectively argue his claim of economic and medical duress); **EEOC, supra** (discussing plaintiff's failure to effectively argue his claim of economic duress); **Nicholas, supra** (discussing plaintiff's failure to effectively argue his claim of economic duress).

Finally, this Judge shall address Complainant Lee's repeated assertions that the release is invalid based upon Respondent's falsification of the reason for the lay-off which precipitated the signing of the release. In this regard, Complainant Lee attests that Respondent's stated reason for the lay-off, a 'lack of work' reason, was an excuse. Complainant Lee asserts this

cannot be true because he is the only engineer at the Nuclear Analysis Section and, as such, the only person who could use the fuel vendor design code for performing engineering applications. Furthermore, Complainant Lee points to the fact that there have been many job advertisements that fit Complainant Lee's experience[15] as further indicia that the 'lack of work' excuse was false.

In a further attempt to establish that the stated reason for the termination was false, Complainant Lee states the scores used by Respondent to lay Complainant Lee off contradict the job performance evaluations Complainant Lee had received from 1985 to 1993. Complainant states, in his opposition to the Motion for Summary Judgment, Part I(3), that the scores were provided to Complainant by the NRC on April 10, 1996. In 1994, Complainant Lee received four NI (need improvement) rankings, he never got a review in 1995, and in January 1996 he was laid off by those same persons to whom he had raised his nuclear safety concerns. In his affidavit, however, Complainant Lee states he first learned of the matrix when the NRC showed him a letter from Mary Riley to the DOL. That letter was dated April 17, 1996.

Basically, Complainant Lee's argument can be reduced to this: Complainant is of the opinion that the release should be invalidated because Respondent selected him for the 1996 lay-off based on an evaluation which was specifically drafted to result in a low score for employees who had reported nuclear safety concerns and thereby ensure that those employees would be selected for termination. Therefor, according to Complainant Lee, his execution of the release was neither knowing nor voluntary.

This claim is belied by Complainant Lee's attestation that he "was very upset when [he] was told that [he] had been selected for lay-off, and was particularly concerned that an on-going dispute with [his] supervisors over [his] performance evaluations in 1994, and [his] safety concerns in 1995 might have been factors in NU's decision." It is plain from this statement that Complainant Lee was of the suspicion, prior to executing the release, that his selection for the lay-off was less than bona fide. Indeed, Complainant Lee knew that his selection for lay-off was premised upon an evaluation. Complainant knew this information based upon his conversation with the unidentified woman in Human Resources and he knew that the evaluation was not a part of his personnel file when he received that file on or about January 29, 1996. Armed with this very specific knowledge and hoping that Mr. Richters, from whom Complainant had sought a review of what he believed to be his unjust lay-off, Complainant Lee nevertheless signed the release on February 14, 1996.

These facts, established primarily by Complainant Lee's own affidavit, compel the conclusion that Complainant Lee suspected Respondent's ulterior motives in selecting him for the 1996 lay-off. It is on those very grounds that Complainant now attempts to invalidate the release. Complainant Lee's confirmation of his suspicion of retaliatory conduct based on his prior protected activity, which suspicion pre-dated his execution of the release, does not negate his waiver of his rights. **See Generally Finz v. Schlesinger**, 957 F.2d 78 (2d Cir. 1992) (wherein the

court opined the employee's subsequent discovery of information which confirmed his belief as to his entitlement to a certain benefit did not negate that employee's waiver of his rights); **Bormann, supra** (wherein the court opined the employees' suspicions of employer's motives prior to signing the release and stated that those suspicions belied any claim that they did not suspect that employer may have had discriminatory motives in formulating the termination payment plan).

**Conclusion**

Based on the foregoing, this Judge has determined that the General Release and Covenant Not to Sue was entered into knowingly and voluntarily and is a fair, adequate and reasonable settlement of Complainant's ERA claims which pre-date the signing of the document. As such, it is hereby **RECOMMENDED** that the release be **APPROVED**, that Respondent's Motion for Summary Judgment be **GRANTED** based on the valid release, and that the complaint be **DISMISSED WITH PREJUDICE**.

**DAVID W. DI NARDI**
**Administrative Law Judge**

Boston, Massachusetts
DWD:jw:

**[ENDNOTES]**

[1]Attached to the letter given to Complainant was a list of job titles and ages of those to be laid-off. There were no names on the list, nor did the list identify how many of these people had filed safety concerns in the past. Accordingly, Complainant Lee did not know, at the time he was laid-off, that other terminated employees had also raised safety complaints.

[2]Complainant Lee would later come to find out that the evaluation used to determine who would be affected by the lay-off was called the matrix or the matrix evaluation.

[3]Complainant Lee's 1993 performance evaluation was missing and there was no evaluation for 1995 because, according to Virginia Fleming in Respondent's Personnel Office, no performance review was done in that year.

[4]Although Complainant indicates this as the first time he learned of the matrix evaluation, **see** affidavit para. 19, I note he truly first learned of the evaluation, although not by its specific name, when he spoke with the unidentified woman in Human Resources sometime between January 11 and January 29, 1996.

[5]Attorney Riley no longer occupies this position.

[6]It is not clear from Complainant Lee's affidavit or his opposition to the Motion for Summary Judgment as to when he came into possession of this letter.

[7]As the affidavit recites, this is a belief of Complainant Lee and the allegation is not supported by specific fact.

[8]This language is further discussed **infra**, at pp. 7-8.

[9]At page 1, paragraph 1, Complainant releases and forever discharges Respondent "from any and all claims, charges, grievances, demands, actions or liabilities of any nature whatsoever, known or unknown, suspected or unsuspected,..., including but not limited to claims, charges, grievances,, demands, actions or liabilities of any nature, arising from or relating in any way to any act or omission occurring prior to the date of this Release..." At page 1, paragraph 3, Complainant releases Respondent from "any and all claims that I have or may he had against the [Respondent], including ... any statutory or common law claims, including but not limited to claims for ... wrongful discharge or violation of public policy. At page 1, paragraph 4, Complainant agrees he will "never institute a claim, grievance, charge, lawsuit, or action of any kind against the [Respondent] including but not limited to claims related to my employment or termination from my employment..."

[10]Complainant Lee's ERA claim was originally consolidated with complaints of three other complainants because of the similarity of issues. The complaints were subsequently bifurcated because there are no allegations in Complainant Lee's complaint, numbered 97-ERA-29, over which this Judge may retain jurisdiction. In comparison, the three other complainants have alleged retaliatory conduct which post-dates their individual releases. Accordingly, this Judge has retained those complaints for a hearing on those blacklisting matters.

[11]Also in this regard, I found it interesting that while Complainant Lee relies on advice allegedly given to Complainant Collins by Attorney Heagney, Complainant Collins does not mention this advice in his affidavit nor in his opposition to the Motion for Summary Judgment.

[12]Ms. Guerard admits that Complainant Lee did meet with her to discuss his particular circumstances, but states that he did not attempt to re-negotiate the release terms.

[13]Other complainants in this once consolidated matter have alleged an attempt and a failure to negotiate terms of the release by another employee. Although Complainant Lee has not attested that this failure to negotiate by the other employee played any role in Complainant Lee's failure to attempt to negotiate at all, it is appropriate to comment on this fact in anticipation of Complainant Lee raising the issue on review. I find the other employee's attempt to negotiate the release irrelevant for the reason that the attempt post-dates Complainant Lee's signing of the release. Logically, this subsequent failure to

negotiate could have no impact on Complainant Lee's previous execution of the release without attempt to negotiate. My finding of irrelevancy is specifically premised upon the timing in this case. Let it be known, however, that I further question whether Complainant Lee could properly have relied upon another employee's failure to negotiate in reaching a determination that his own personal attempt to negotiate would be futile.

[14]The Court of Appeals noted, however, that its conclusion should not be misconstrued to indicate that the employer's unwillingness to negotiate is irrelevant in considering the voluntariness of a waiver. On other facts, the Court indicated it may deny an employer's motion for summary judgment due to its alleged unwillingness to negotiate the terms of a waiver. **Bormann, supra**, at n. 1.

[15]Complainant Lee further attests that he has never been called for an interview in regards to these advertisements. This failure to hire, however, is the subject of a new complaint recently filed by Complainant Lee with the Department of Labor on May 22, 1997. As I have no jurisdiction over that complaint until such time as the investigation is completed and the complaint is forwarded to the Office of Administrative Law Judges, Complainant Lee's Motion to Include Retaliation Claims against Respondent in the current proceeding is **DENIED**. In this regard, **see Order Denying Complainant Lee's Request to Consolidate Complaints**.